STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 22, 2013
v	No. 311054 Wayne Circuit Court
DERRIUS DERELL LAMBERT, a/k/a DARRIUS DERELL LAMBERT, Defendant-Appellant.	LC No. 11-011952-FC

Before: MURPHY, C.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit murder (AWIM), MCL 750.83, intentional discharge of a firearm toward a dwelling, MCL 750.234b, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a second habitual offender, MCL 769.10, to 25 to 40 years' imprisonment for the AWIM conviction, 2 to 6 years' imprisonment for the firearm-discharge conviction, and to 2 years' imprisonment for the felony-firearm conviction. We affirm defendant's convictions but remand for resentencing.

The victim testified that on the evening of December 20, 2010, he was driving his car when he noticed the headlights of a vehicle behind him that was approaching at a fast rate of speed. As the victim passed a well-lit area, he observed that the vehicle in his rearview mirror was being driven by defendant, whom the victim had known for about seven or eight years. There were other individuals in the car with defendant, including one or more of the victim's cousins. The victim stopped at a Coney Island, and he testified that he was able to clearly see defendant's face and that defendant gave him a crazy and angry look. After purchasing food, the victim then drove from the Coney Island to his girlfriend's home, where he dropped off some food. The victim next drove to a friend's house, and when he stopped in front of the home, the victim looked down the street and saw defendant sitting in the car that he had observed earlier. The victim testified that he decided to see whether anything was wrong. He drove up to defendant's car and positioned his vehicle so that the two vehicles were parked in opposite directions, with the driver's side windows aligned next to each other, only a couple of feet apart. The victim testified that he rolled down his window, intending to talk to defendant and one other occupant of defendant's car. At that point, the victim came under a barrage of gunfire. He testified that defendant and a second person in defendant's car both had guns and had opened fire

on the victim. As the victim attempted to drive away, he was hit in the back by a bullet, and he noticed that a bullet had struck a window in the house that he had intended to visit. The victim drove a few blocks to a gas station, and he collapsed inside the station. He testified that he was struck by five bullets in an arm, which he had held up to block his face, that he was in the hospital for one to two months, and that he had nine surgeries. At the scene of the shooting, the police recovered eight spent .40 or .45 caliber bullet casings from a handgun and six rifle casings from an assault weapon. The house that had been hit had bullet holes in a bedroom, the front picture window, and the living room's interior walls. Defendant presented an alibi defense, claiming that he was not in the area of the shooting, that he was at home at the time with his fiancée, and that he did not shoot the victim.

The victim testified that defendant had been driving a four-door, burgundy Saturn when the shooting occurred. He was familiar with the car, as he had seen defendant driving it several times in the past. A police officer testified that the victim had indicated that defendant's car was "a red Saturn or something." Defendant testified that he previously had a "reddish burgundy" "Dodge Stratus." Defendant claimed that the Stratus was in the impound lot of a local towing company on the date of the shooting, December 20, 2010, where it had been sitting since the last week of September 2010. Defendant testified that the Stratus had been stolen, recovered by the police, and then towed to the impound lot. Defendant indicated that the car had been stripped and heavily damaged. He made no effort to recover the Stratus because it had not been insured and he did not have enough money. One of defendant's friends testified for the defense, and he claimed that he and defendant had bought a burgundy Stratus in April 2010. Much to the bewilderment of defense counsel, the friend testified that the Stratus had been stolen in September 2011, not September 2010 as claimed by defendant, that it had been recovered and placed in the impound lot of the towing company mentioned by defendant in October 2011, that it was later auctioned off, that they were the owners of the Stratus on December 20, 2010, and that it was parked outside the friend's house on December 20, 2010 (day of shooting). The prosecution happily confirmed the testimony on cross-examination.[1] After the friend's testimony, and outside the presence of the jury, defense counsel asked the court to give the friend a short period of time to obtain "some communication" from the towing company "to refresh his recollection so he can correct any error" in his testimony. The trial court voiced concerns about hearsay, noted the victim's testimony about a Saturn, referenced the friend's unflinching and damaging testimony, and ruled against delaying the proceedings and possibly having the friend retake the stand after contacting the towing company.

Defendant was convicted as indicated above. At the sentencing hearing, defense counsel initially indicated that he had now obtained documentation from the towing company in question, showing that a "Chrysler Sebring" had been in the impound lot at the time of the crime.

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[1] We note that both defendant and his friend testified about the Stratus being stolen one time previously before it was returned to them. The testimony discussed above focused on the second theft of the Stratus. But again, the friend's testimony placed the Stratus out of the impound lot on the day of the crime.

Defense counsel argued, mistakenly, that defendant's friend had testified at trial "that he in fact was the owner of a Chrysler Sebring." The prosecutor and the trial court, unable to recall the exact testimony from the trial, went along with the argument that the trial testimony by defendant and his friend concerned a Sebring. The trial court stated that it needed the benefit of a transcript of the trial and would consider the issue down the road in the context of a motion for new trial. The court then proceeded with the sentencing. Defendant subsequently raised the issue, along with other issues, in a pro per motion for an interlocutory appeal filed in the trial court. The record does not indicate that the court ruled on the motion.

The record does contain an invoice from the towing company regarding a 2001 red, four-door *Chrysler Sebring*. The invoice indicated that the vehicle had been stolen, recovered by the police, and then impounded from October 16, 2010, until March 3, 2012, when it was sold at auction. The invoice did not contain the name of the vehicle's owner nor any name for that matter.

On appeal, defendant argues that trial counsel was ineffective for failing to obtain the documentation from the towing company prior to trial, which could have been used to refresh the memory of defendant's friend while on the stand, thereby preventing the friend from essentially corroborating the prosecution's case, and which documentation could have been used to support defendant's alibi defense.

A claim of ineffective assistance of counsel presents a mixed question of fact and constitutional law, and we review the trial court's factual findings for clear error, while constitutional issues are reviewed de novo. *People v Grant*, 470 Mich 477, 484-485; 684 NW2d 686 (2004). In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court recited the well-established principles applicable to an ineffective assistance claim:

> A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy [a] two-part test. First, the defendant must show that counsel's performance was deficient.[2] This requires showing that counsel made errors so serious that counsel was not performing as the counsel guaranteed by the Sixth Amendment. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. Second, the defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the

[2] Establishing deficient performance requires a showing that counsel's "representation fell below an objective standard of reasonableness[.]" *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

defendant necessarily bears the burden of establishing the factual predicate for his claim. [Citations and internal quotation marks omitted; emphasis added.]

The necessary factual predicate for defendant's argument on appeal is that the vehicle in the impound lot of the towing company was the vehicle belonging to defendant and his friend. The clear problem with this proposition is that the towing company's invoice reflected, consistent with defense counsel's argument at sentencing, that the car in the impound lot was a Chrysler Sebring, whereas both defendant and his friend testified that their car was a Dodge Stratus. It would defy logic to conclude that defendant and his friend mistakenly believed that their very own car was a Stratus and not a Sebring. Moreover, the invoice does not contain any information that otherwise connects the Sebring to defendant, nor has defendant presented any argument establishing a connection. Furthermore, the victim did not identify the vehicle as a Sebring, there was no evidence of a Stratus or Saturn in any impound lot, and defendant's friend emphatically placed the Stratus on the streets on the day of the crime. Although it would be nonsensical to conclude that defendant and his friend did not know the type and make of their own vehicle, it is certainly conceivable that the victim mistook a Stratus for a Saturn, assuming that it was in fact a Stratus that was used in the shooting. Evidence of a Sebring in the towing company's impound lot would have been entirely irrelevant. Additionally, the victim was very familiar with defendant and observed him at close range directly before and at the time of the shooting, thereby giving significant weight to the victim's identification of defendant as the shooter. Accordingly, counsel's performance was not deficient, nor has any prejudice been established.

In a supplemental pro per brief filed pursuant to Supreme Court Administrative Order No. 2004–6, Standard 4, defendant further argues that trial counsel failed to adequately prepare for trial, failed to hire an investigator, and failed to investigate and interview witnesses. He also contends that the trial court abused its discretion in not granting short adjournments as requested during the trial and at sentencing. The factual predicate of all of these arguments is that defendant's vehicle was in the towing company's impound lot when the victim was shot. Again, on the record presented, the factual predicate fails miserably. Reversal is absolutely unwarranted. To the extent that defendant's Standard 4 arguments encompass more than the issue concerning the impoundment of a vehicle, they are speculative and unsupported and thus fail. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

Finally, defendant raises an issue concerning sentencing. He contends that the trial court erred in sentencing him as an habitual offender because the prosecutor had withdrawn the notice of habitual offender enhancement. Defendant had been charged as a second habitual offender, MCL 769.10, which was reflected in the felony information. However, on the first day of trial, the prosecutor sought to amend the information, stating, "And the habitual offender second offense notice we're also withdrawing." The court responded, "Okay." At sentencing, as the court tried to recall whether the habitual offender notice had been stricken, the prosecutor and defense counsel noted their belief that it had not been stricken, and all proceeded as if defendant was a second habitual offender. The trial court, after making some scoring changes to the sentencing variables, calculated the minimum guidelines sentence range at 171 months to 356 months, which is the proper range for a second habitual offender. See MCL 777.16d (AWIM is a class A offense); MCL 777.21(3)(a) (increase upper limit of minimum sentence range by 25% if offender sentenced for a second felony); MCL 777.62 (sentencing grid for class A offenses –

offense variable level VI, prior record variable level D). Absent the second habitual offender enhancement, the guidelines range would be 171 to 285 months. The minimum sentence imposed by the court for the AWIM conviction was 25 years or 300 months. Therefore, absent consideration of the enhancement, the minimum sentence that was actually imposed would constitute an upward departure from the guidelines. Because the record clearly reflects that the prosecutor withdrew the habitual offender notice, and given that the prosecution concedes error in its brief on appeal, we conclude that defendant was improperly sentenced as a second habitual offender. Considering the error and alteration with respect to the guidelines range as caused by the improper enhancement, along with the fact that the minimum sentence was not "within the *appropriate* guidelines sentence range[,]" MCL 769.34(10) (emphasis added), defendant is entitled to resentencing. See *People v Francisco*, 474 Mich 82, 89-92; 711 NW2d 44 (2006).

Affirmed with respect to defendant's convictions; however, the AWIM sentence is vacated and we remand for resentencing on the AWIM conviction. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens